



9TH ANNUAL U.S. DEPARTMENT OF ENERGY SMALL BUSINESS CONFERENCE

PLENARY SESSIONS

TEAMING

“Legal Aspects of Teaming Agreements”

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INTRODUCTION:WHAT IS A TEAMING AGREEMENT?

- "An arrangement pursuant to which ...
 - A. Two or more companies form a partnership or joint venture to act as a potential prime contractor; or
 - B. A potential prime contractor agrees with one or more other companies to have them act as its subcontractors under a specified government contract or acquisition program."



FIRST PRINCIPLE:

FORMALITY OF TEAMING AGREEMENTS

- Teaming agreements should be in writing
- Written teaming agreements more clearly ascertain the intentions, obligations, and responsibilities of the parties.



SECOND PRINCIPLE:

ADVANCE CONFIDENTIALITY AND NON DISCLOSURE

- Potential teaming partners should have their proprietary data protected during the time when the parties are evaluating whether to form a team.
- Such document should be in writing and signed by both parties prior to the time a decision is made on whether or not to team.
- The agreement should be a different document than the teaming agreement.
- The document should contain responsibilities on the part of the potential teaming partners and other relevant parties on the treatment of proprietary data during the time when the parties are evaluating whether to form a team.



THIRD PRINCIPLE: **NOTICE OF INTENT**

- It should clearly be stated in the teaming agreement whether or not the prime contractor intends to award a subcontract to the potential subcontractor if the prime contractor is awarded the contract in question.
- Alternatively, the teaming agreement should contain language on whether the agreement represents a non-binding expression of interest to award a subcontract to the potential subcontractor in the future.
- Moreover, the teaming agreement should clearly point out whether there are any conditions relating to whether or not the prime contractor will award a potential subcontractor a subcontract should it be awarded the prime contract



For Example:

- "Neither party shall be bound by the terms and conditions of this agreement until execution of the Subcontract."
- "Terms of this Agreement are subject to final execution of the Subcontract."
- Providing for termination of the agreement if negotiation and execution of a subcontract are not concluded within a specified period after prime contract award.
- ANY PROVISION that allows the prime contractor to withdraw from the Teaming Agreement at its "sole discretion."



FOURTH PRINCIPLE:

ESSENTIAL TERMS OF THE TEAMING AGREEMENT

- If the prime contractor indeed intends to award a subcontract to the potential subcontractor should the prime in fact be awarded the Federal contract, the teaming agreement should contain all of the conditions essential to an implementing subcontract for the portion of work that the potential subcontractor is responsible for performing.
- Such terms should include, but not be limited to: 1) an explicit identification of the work the subcontractor will perform; 2) the price to be paid for the work, which may be defined in terms of the percentage of the total value of the contract; 3) the estimated quantity of goods or services involved; 4) the anticipated time of performance; 5) the date of delivery of the work; and, 6) the time for payment.



FIFTH PRINCIPLE: **PROTECTION OF INTELLECTUAL PROPERTY**

Parties to a teaming agreement are expected to insist upon clauses within the teaming agreement that limit exposure of their intellectual property and other proprietary data to a degree that would not undermine the value of the company itself.



PROTECTION CLAUSES SOMETIMES USED

- "Prime contractor shall not acquire any rights in any products in which subcontractor owns any intellectual property rights."
- "Prime contractor shall not acquire any proprietary rights in any products developed by subcontractor."
- "Prime contractor agrees to identify all patents, copyrights, and trademarks that are registered to subcontractor as the property of subcontractor in any communication."
- "Prime contractor shall use the same degree of care normally used to protect its own intellectual property."



PROTECTION CLAUSES SOMETIMES USED (CONT'D)

- "No grant under any of subcontractor's intellectual property rights is hereby given or intended, including any license, implied or otherwise."
- "[Subcontractor] grants [Customer or Contractor] a perpetual [or time limited], non-exclusive license to use the products [define] developed by [subcontractor] for [customer or contractor] under this agreement, only for the purpose of [list]. All copyrights, patent rights, and other intellectual property rights are retained by [subcontractor]"



SIXTH PRINCIPLE: TERMINATION CLAUSES

The teaming agreement should contain no termination clauses that contradict the intention of the prime contractor to award a subcontract to a potential subcontractor.



SEVENTH PRINCIPLE: **DISCLOSURE REQUIREMENTS**

The teaming agreement should contain language requiring the prime contractor to notify the potential subcontractor if any changes are made to the potential subcontractor's statement of work, amount of work, price of work or the manner in which the work is to be delivered under the contract in question.



EIGHTH PRINCIPLE:

PROSELYTIZING OF EMPLOYEES

The parties should agree that during the term of the Agreement, neither of them will solicit, hire, or otherwise proselytize each other's technical or professional employees for work on the Contract, without prior approval of the current employer.



NINTH PRINCIPLE:

DISPUTES AND DAMAGES

- To the greatest extent possible the teaming agreement should contain clauses to resolve disputes arising from the teaming agreement utilizing alternative dispute resolution methods such as mediation and arbitration.
- Both parties should recognize the right of the other party to include clauses providing the payment of damages for a breach of the teaming agreement.



DAMAGES CLAUSE SOMETIMES USED

- "In the event that Prime Contractor is awarded a Prime Contract by the Government and Prime Contractor fails to negotiate the Subcontract in good faith as set forth in this Agreement, Prime Contractor agrees to indemnify, defend, and hold Subcontractor harmless from all claims, liabilities, costs, losses, expenses and damages (including but not limited to reasonable attorneys' fees) arising out of or resulting from Prime Contractor's failure to meet its obligation under this agreement."



WHEN THE SMALL BUSINESS IS THE PRIME

BEWARE AND BE AWARE OF:

- AFFILIATION
- OSTENSIBLE SUBCONTRACTOR RULE
- UNUSUAL RELIANCE



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